

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF INSURANCE,

Petitioner,

vs.

JOSEPH E. WARDEN,

Respondent.

No. 06-0996 DI

060602238C

DECISION

The Director of Insurance ("the Director") has cause to discipline Joseph E. Warden for using the employee medical reimbursement policy of Capital Reserve Life Insurance Company ("CRL") to obtain reimbursement for non-existent medical expenses.

Procedure

The Director filed a complaint. Warden answered. We held a hearing on February 20, 2007. Tamara A. Wallace appeared for the Director. Neither Warden nor anyone representing him appeared. However, Warden did file a written argument after the hearing. The case became ready for our decision on May 29, 2007, when the Director filed a reply argument.

On July 20, 2007, Warden filed a brief responding to the Director's reply brief. The Director has requested that we, in effect, strike Warden's brief as not having been provided by our briefing schedule. Warden's brief makes the same points that his first written argument did,

and alleges facts, most of which we cannot consider because he did not testify to them under oath at the hearing. Therefore, we see no prejudice to the Director. We deny the Director's motion.

Findings of Fact

1. The Director issued an insurance producer license to Warden on June 20, 2000. The license expired on June 20, 2006.
2. During the times relevant to these findings, CRL was a joint stock, legal reserve life insurance company organized under the laws of Missouri and qualified to do business under §§ 376.010 to 376.670. CRL is located in Jefferson City.
3. The management of CRL is vested in a board of directors elected by the shareholders. Members of the Warden family own all of the shares of CRL.¹ As of June 30, 2005, all of the members of the board of directors, except Tony Hutchinson, were related.
4. CRL had from 12 to 19 employees.
5. Warden was a certified public accountant who had worked for 27 years with Price, Waterhouse, Coopers, before coming to CRL in 1999. Warden became a member of CRL's board of directors. He was also CRL's president, chief executive officer, chief financial officer, and broker for CRL's investments.² He was responsible for overseeing all the operations of CRL.
6. Warden's wife, Linda, was the manager of marketing in 2004 and until September 12, 2005.³

¹In the past, two families, the Rileys and the Wardens, owned all the shares of CRL. At some point, the Wardens bought out the Rileys. This appears to have taken place before 2004. See statements of Tony Hutchinson and Beverly Gregory recorded in Petitioner's Exhibit 3 at 14-15.

²The Director alleges that Warden became the president and CEO around November 11, 1999. (Compl. ¶ 5.a.) The only evidence as to when Warden began was Hutchinson's statement that Warden came to CRL in 1999. (Pet. Ex. 3 at 17.)

³There was little evidence that Linda Warden actually performed any services. Gregory said that Linda Warden "was on the payroll, but, no, she did not work there." (Pet. Ex. 3 at 5.)

7. When Warden was the president he decided to cut CRL's health insurance premium costs by obtaining a health insurance plan with much higher deductibles. He also decided that CRL would reimburse employees for their out-of-pocket medical and dental expenditures.

8. Warden was the president of CRL in January 2001, when CRL entered into a PPO agreement with Blue Cross/Blue Shield ("the plan"). The plan provided for an annual \$1,000 per individual and \$3,000 per family deductible and a \$20 per office co-payment for visits to providers within the PPO network. If a member received care from a provider outside the PPO network, the plan reduced the eligible expenses for such services by 20 percent.

9. In 2001, CRL also had dental insurance to pay for some of the dental expenses of employees.

10. In 2001, Warden initiated a policy of reimbursing all employees for medical and dental expenses that the plan and the dental insurance did not cover ("reimbursement policy"). The board of directors never approved Warden's policy.

11. Tony Hutchinson was CRL's controller. He was not related to the Warden family. Warden directly supervised Hutchinson. Hutchinson oversaw all the accounting procedures at the company. Hutchinson was aware of what items entered the accounting system for the employee medical and dental reimbursement program, but was not authorized to sign reimbursement checks. Warden had instructed Hutchinson to not sign reimbursement checks because it was Hutchinson's responsibility to reconcile the checking accounts.

12. Beverly Gregory was the human resources director. She had worked at CRL for over 30 years, but was not a member of the Warden family. She was also responsible for premiums, custodian of policy holders' records, and for reviewing and approving documentation for expenses, including medical and dental, and directing that expense reimbursement checks be written.

13. No one put into effect formal procedures regarding the implementation of the reimbursement policy. Instead, the practice was for employees to submit documentation of the expenses, such as explanations of benefits, invoices from medical care facilities, and the like. Gregory reviewed the documentation. If approved, she had the checks drafted and signed.

14. Warden submitted some of the requests for his own reimbursements. Linda Warden submitted requests for reimbursements by sending them from home by her personal assistant or housekeeper.

15. Hutchinson and Gregory eventually began to question the legitimacy of the documentation, especially after expenses for which Warden and his wife sought reimbursement became very large. Attempts to ask Linda Warden about invoices met with hostility.

16. A few weeks before the insurance examiners were coming to audit CRL, Hutchinson called Boone Hospital Center ("BHC") and found out that an account number on an invoice for Warden did not exist. BHC confirmed that they had provided medical services to Warden, but that they were provided on dates different than shown on the submitted invoice and that there was no outstanding balance because BHC had written off the balance remaining after the insurance carrier paid.

17. Hutchinson's and Gregory's attempts to question the legitimacy of the Wardens' reimbursements and to bring their doubts to the attention of members of the board of directors met with inaction by the members and by the board.

18. CRL paid the following amounts in the designated calendar years to all employees under the reimbursement policy:⁴

⁴Figures taken from Account # 4322 "Medical Reimbursements" (highlighted) on the first page of Petitioner's Exhibit 17.

<u>Year Ending</u>	<u>Total \$ Reimbursement</u>	<u>% of Change</u>
12/30/01	30,635	N/A
12/31/02	26,968	-11%
12/31/03	77,174	186%
12/31/04	311,740	304%
01/01/05 to 06/30/05	343,408	10%
01/01/05 to 12/31/05	686,817	120%

19. The expenditures under the reimbursement policy became an increasingly larger percentage of total expenses and an even larger percentage of non-salary expenses:⁵

<u>Year Ending</u>	<u>% of Expenses</u>	
	<u>Total</u>	<u>Non-Salary</u>
12/30/01	1.79	4.84
12/31/02	1.81	4.46
12/31/03	4.84	11.02
12/31/04	15.81	29.99
01/01/05 to 06/30/05	28.54	49.06

20. In 2004 and 2005, over 80 percent of the medical expenses under the reimbursement policy were paid to Warden and his wife:⁶

<u>Period</u>	<u>Jos./Linda Warden Expenditures</u>	<u>% of Total</u>
01/01/04 to 12/31/04	265,236.26 ⁷	81.63 %

⁵Bottom of the second page of Petitioner's Exhibit 17.

⁶Pet. Ex. 18.

⁷We take this amount from the "Total" in the yellow column on page 14 of Petitioner's Exhibit 18. When the preparer placed the "2004 Total" on page 5 to add to the "2005 Total," the 2004 total was inadvertently changed from 265,236.26 to 256,236.26. Therefore, the total medical reimbursements for Joseph and Linda Warden in 2004/2005, which is shown on page 5 as \$605,864.60, should be \$614,846.60.

01/01/05 to		
08/03/05	349,628.34	88.62%

21. In 2004, Warden picked up some of the reimbursement checks made payable to him or Linda. These were for smaller amounts than were the checks made payable to Warden and Linda later in 2004 and in 2005.⁸

22. Some of the reimbursements paid to Warden and his wife were for services purportedly rendered by BHC.

23. In 2004 and 2005, Warden and his wife held a joint account at Exchange Bank, number 00788090 ("the Wardens' joint account").⁹ They used the money in the account for personal and family expenditures.

24. In 2004, CRL reimbursed Warden and his wife \$156,283.01 for 39 instances of medical service that BHC purportedly rendered to them.¹⁰ Warden and his wife deposited all of the reimbursement checks in the Wardens' joint account.¹¹

- a. Reimbursements for Linda Warden totaled \$18,167.43 for five services allegedly provided by BHC.
- b. Documentation submitted for Linda Warden's reimbursements consisted of five letters on BHC letterhead addressed to Linda Warden and identifying her as the patient. Each letter included a different account

⁸Hutchison and Gregory were not certain how the checks issued later on to Linda and Warden got to the Wardens. They did not think any were ever mailed to them.

⁹We make this finding based on the documents in Petitioner's Exhibit 16. Petitioner's Exhibit 16 comprises copies of the front and back of all the expense checks issued to Warden and his wife that were listed on Petitioner's Exhibits 10 (2004) and 12 (2005). The last page of Petitioner's Exhibit 16 is a deposit slip for the Wardens' joint account. The account number on the deposit slip is the same as stamped on the back of each check.

¹⁰Petitioner's Exhibit 10 is the summary of the letters from BHC submitted for reimbursements for medical services provided at BHC and reimbursed in 2004 ("2004 Summary"). Petitioner's Exhibit 11 comprises BHC's letters. The table at page 1 of Petitioner's Exhibit 8 also summarizes the letters in Petitioner's Exhibit 11.

¹¹Included in the checks are reimbursements for expenses, both medical and non-medical, in addition to those allegedly incurred at BHC.

number, total charges, adjustments, insurance payments, balance due, and the date on which services were received.¹²

- c. Only one of the account numbers is for an account that BHC actually had for services to Linda Warden, but the dollars associated with the charges, payments, and balances are incorrect. The rest of the account numbers do not designate any BHC accounts relating to Linda Warden.
- d. Reimbursements for Joseph Warden totaled \$138,115.58 for 34 services allegedly provided by BHC.
- e. Documentation submitted for Joseph Warden's reimbursements consisted of 34 letters purportedly from BHC, containing account numbers and the same type of information as in the letters to Linda Warden.
- f. Only two account numbers designate actual BHC accounts for Joseph Warden. The dollar amounts reflecting purported charges for medical services as to those two account numbers are inaccurate. One of the two account numbers, #240445965, is used for services provided on three different dates. This is inconsistent with BHC's practice to use a different account number for each date of service for the same patient.
- g. The rest of the account numbers do not designate any BHC accounts relating to Joseph Warden.

¹²Petitioner's Exhibit 11 comprises the letters for Joseph and Linda Warden.

25. In 2005, CRL reimbursed Warden and his wife \$327,658.35 for 57 instances of medical service that BHC purportedly rendered to them.¹³ Warden and his wife deposited all of the reimbursement checks in the Wardens' joint account.

- a. Reimbursements for Linda Warden totaled \$34,356.17 for eight services allegedly provided by BHC.
- b. Documentation submitted for Linda Warden's reimbursements consisted of eight letters of the same type as submitted for her 2004 reimbursements.
- c. Only one account number, 24004128, is for an actual BHC account for Linda Warden, but she did not receive medical services from BHC on the date of service indicated, March 7, 2005. The rest of the account numbers do not designate any accounts relating to Linda Warden.
- d. Reimbursements for Joseph Warden totaled \$293,302.18 for 49 services allegedly provided by BHC.
- e. Documentation submitted for Joseph Warden's reimbursements consisted of 49 letters purportedly from BHC.
- f. Only two account numbers are for actual BHC accounts of Joseph Warden, but the dollar amounts in the letters reflecting purported charges for medical services are not accurate. The rest of the account numbers do not designate any BHC accounts relating to Warden.

¹³Petitioner's Exhibit 12 is the summary of the letters submitted for reimbursements for medical services provided at BHC in 2005 ("2005 Summary"). Petitioner's Exhibit 13 comprises the documentation for 2005. The tables in Petitioner's Exhibit 5 and on page 2 of Petitioner's Exhibit 8 also summarize the letters in Petitioner's Exhibit 13. One of the letters in Petitioner's Exhibit 13 identifies medical services purportedly provided for Linda Warden at account #240788651, which the 2005 Summary correctly identifies. However, the first line on Petitioner's Exhibit 5 mistakenly identifies the patient for account #240788651 as Joseph Warden.

26. In 2004 and 2005, Warden knew that the requests for reimbursement of medical expenses at BHC that he and his wife submitted were based on false documentation designed to obtain for them reimbursement for medical services that BHC never provided to them. Warden knew that the reimbursements he and his wife received included those for services that he and his wife never received from BHC.

27. Effective in September 2005, Warden resigned as president.¹⁴ About the same time, CRL stopped reimbursing employees for those medical and dental expenses not reimbursed by insurance. Warden resigned from the board of directors, effective October 6, 2005.

28. CRL terminated Linda Warden, effective September 12, 2005.

Conclusions of Law

We have jurisdiction over the complaint.¹⁵ The Director has the burden of proving facts for which the law allows discipline.¹⁶

I. Preliminary Matters

A. Abandoned Charge

The Director included in his complaint allegations that Warden and his wife submitted claims under the reimbursement policy for dental expenses that were not covered. The Director did not attempt to prove any wrongdoing regarding dental expenses at the hearing. Warden is not subject to discipline on those allegations.

B. Uncharged Conduct

At the hearing the Director introduced evidence through Petitioner's Exhibits 14 and 15 to show Warden's improper conduct regarding the reimbursement for his non-medical expenses and for his and his wife's medical expenses that were for services other than those that BHC

¹⁴Petitioner's Exhibit 2 reports two different effective dates for the resignation: September 6, 2005, at 7 and September 12, 2005, at 22.

¹⁵Section 621.045. Statutory references are to RSMo Supp. 2006 unless otherwise noted.

¹⁶*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

provided. The complaint contains no allegations about this conduct and does not identify which laws authorize discipline for such conduct. Our regulations, as well as the requirements of due process, require that the allegations in the complaint put Warden on notice of what he is to defend himself against.¹⁷ We cannot find discipline for uncharged conduct.¹⁸ Therefore, we make no decision as to the expense reimbursements set forth in Petitioner's Exhibits 14 and 15.

C. Warden's Post-Hearing Written Argument

Warden did not appear at the hearing. He did submit a written argument after the hearing. In that argument, he not only presented arguments based on the evidence admitted at the hearing, but also made factual statements that were not part of the hearing record. Generally, we can consider only evidence introduced at the hearing unless the parties otherwise agree and seek our leave to introduce evidence otherwise. Those conditions do not exist here. "[E]xcept where facts asserted in a party's brief are conceded to be true by the adversary party, statements in briefs are not evidence and are insufficient to supply essential matters for review."¹⁹ Therefore, we disregard the factual assertions in Warden's written argument, except for those acknowledged as true in the Director's reply.

II. Employee Reimbursement Policy

The Director bases the five counts of his complaint upon the reimbursements to Warden and his wife for medical services that BHC never provided.

The Director contends that § 375.141.1(2) allows discipline under Counts I and II. Section 375.141.1(2) allows discipline for:

¹⁷1 CSR 15-3.350(2)(A)3 and 4; *Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs*, 744 S.W.2d 524, 538-39 (Mo. App., E.D. 1988).

¹⁸*Missouri Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993).

¹⁹*State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App., S.D. 1997).

[v]iolating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state[.]

(Emphasis added.)

Count I

The Director contends that Warden violated § 375.390, RSMo 2000, which provides:

No officer, stockholder, agent or employee of any insurance company, formed under the laws of this state, or doing business herein, shall, directly or indirectly, use or employ, or permit others to use or employ, any of the money, funds or securities of such company for private profit or gain, and any such use shall be deemed a felony, punishable, upon conviction, by imprisonment in the penitentiary not less than two years nor more than five years for each offense.

This is an “insurance law” because its express terms protect the funds of “any insurance company” from the wrongful acts of its officers, employees, etc. CRL is an insurance company formed and doing business under Missouri’s laws. Warden submitted and allowed his wife to submit false documentation under CRL’s reimbursement policy to obtain funds from CRL for deposit into the Wardens’ joint account. They used the joint account for personal and family expenditures. In this way, Warden did “directly or indirectly, use or employ, or permit others to use or employ, any of the money, funds or securities of such company for private profit or gain[.]” Warden violated § 375.390, and is therefore subject to discipline under § 375.141.1(2).

Count II

The Director asserts Warden violated § 570.090.1(4), which provides:

1. A person commits the crime of forgery if, with the purpose to defraud, the person:

* * *

(4) Uses as genuine, or possesses for the purpose of using as genuine, or transfers with the knowledge or belief that it will be used as genuine, any writing or other thing including receipts and

universal product codes, which the actor knows has been made or altered in the manner described in this section.

The Director cites § 375.141.1(2) as the law allowing discipline for violations of § 570.090.1(4). However, § 570.090.1(4) is not “an insurance law.” Section 570.090 does not apply to anyone solely because of their connection to the insurance business. As part of “The Criminal Code,”²⁰ enacted in 1977, it is a criminal law that applies to all people.²¹ It certainly applies to the Director’s licensees and others engaged in the insurance business, but only because they are members of the general public, all of whom are subject to the Criminal Code. Accordingly, even if Warden violated § 570.090.1(4), it would not be cause for discipline under § 375.141.1(2). Therefore, we find no cause for discipline under Count II.

Count III

The Director cites § 375.141.1(4), which allows discipline for:

[i]mproperly . . . misappropriating . . . any moneys . . . in the course of doing insurance business[.]

Misappropriation is “[t]he unauthorized, improper, or unlawful use of funds or other property for [a] purpose other than that for which intended.”²² Warden misappropriated the CRL funds that were supposed to be used to reimburse employees’ medical expenses when he and his wife obtained the funds for their personal use without having incurred medical expenses. Warden did this in the course of doing insurance business because he implemented the reimbursement policy as a personnel policy to benefit the insurance company’s employees and he was responsible for administering it honestly. Instead, he used the policy to obtain CRL’s money for non-existent medical expenses. There is cause for discipline under § 375.141.1(4).

²⁰Section 556.011, RSMo 2000.

²¹L. 1977, S.B. 60, page 658, 698. (79th Gen. Assem., 1st Reg. Sess.), effective January 1, 1979.

²²*Monia v. Melahn*, 867 S.W.2d 709, 713 (Mo. App., E.D. 1994).

Count IV

Section 375.141.1(7) allows discipline for:

[h]aving admitted or been found to have committed any . . .
fraud[.]

Fraud is an intentional perversion of truth to induce another to act in reliance upon it.²³ It requires the intent that others rely on the misrepresentation.²⁴ Warden committed fraud when he submitted documentation of services purportedly received at BHC knowing that it was false and intended that Gregory rely on the documentation to authorize the issuance of reimbursement checks to himself for medical services that BHC had not provided. There is cause for discipline under § 375.141.1(7).

Count V

Section 375.141.1(8) allows discipline for:

[u]sing fraudulent, coercive, or dishonest practices, or
demonstrating incompetence, untrustworthiness or financial
irresponsibility in the conduct of business in this state or
elsewhere[.]

We have already determined that Warden engaged in fraud regarding the reimbursement policy.

Dishonesty is a lack of integrity, a disposition to defraud or deceive.²⁵ Dishonesty includes actions that reflect adversely on trustworthiness.²⁶ Incompetence is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.²⁷ The definition of “trustworthy” is “worthy of confidence” or

²³*Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 n.2 (Mo. App., W.D. 1997).

²⁴*Sofka v. Thal*, 662 S.W.2d 502, 506 (Mo. banc 1983); see also *Missouri Dental Bd. v. Bailey*, 731 S.W.2d 272, 274-275 (Mo. App., W.D. 1987).

²⁵MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed 2004).

²⁶See *In re Duncan*, 844 S.W.2d 443, 444 (Mo. banc 1992).

²⁷Section 1.020(8), RSMo 2000; *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004).

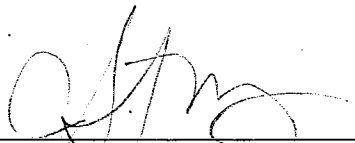
“dependable.”²⁸ To be responsible is to be “able to answer for one’s conduct and obligations : TRUSTWORTHY[.]”²⁹

Warden was involved in the conduct of business as the president, chief executive officer, and chief financial officer of CRL. These positions imposed upon him the responsibility to conduct the business of CRL , including the implementation and operation of its employee benefits programs, in an honest and competent manner. His fraudulent and dishonest practices involving the obtaining of reimbursement for non-existent medical expenses shows that he was not inclined to use his abilities to conduct CRL’s business and that he was untrustworthy and financially irresponsible in regard to the duties he had to manage and operate CRL. There is cause for discipline under § 375.141.1(8).

Summary

There is cause to discipline Warden under § 375.141.1(2), (4), (7), and (8).

SO ORDERED on August 1, 2007.



JUNE STRIEGEL DOUGHTY
Commissioner

²⁸WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2457 (unabr. 1986).

²⁹MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1062 (11th ed 2004).